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DIVISION II  
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STATE OF WASHINGTON  
BY VJ  
DEPUTY

NO. 35944-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

DUSTIN R. KELLEY, Appellant.

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APPELLANT'S BRIEF

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PM 9-26-07

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## **I. ASSIGNMENTS OF ERROR**

1. Defense counsel was ineffective in that he did not introduce evidence of Kelley's mental illness at trial.
2. Defense counsel was ineffective in that he did not propose a diminished capacity instruction.
3. The imposition of firearm enhancements on count III based on the jury's finding that Kelley was armed with a firearm, where the underlying conviction required the jury to make the same finding, violated double jeopardy prohibitions.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was Kelley deprived of effective assistance of counsel when his attorney failed to introduce evidence of his mental illness to support his defense of failure to form the requisite intent for premeditated murder and failed to propose a diminished capacity instruction?
2. Did the imposition of firearm enhancements for second degree assault with a handgun violated the constitutional prohibitions on

double jeopardy where the use of the handgun was a required element of the underlying conviction, and also formed the necessary fact justifying the firearm enhancements?

### **III. STATEMENT OF THE CASE**

This case arises from the shooting death of Beau Pearson.

Pearson's friend, Klaus Stearns, used the trailer in his mother's backyard as a hangout for his friends. RP 536.

On February 22, 2006, at around 5:30 p.m., Pearson, Kelley Kowalski, and Valerie Greenfield were hanging out in the trailer. RP 227-28, 536. Stearns stepped out to talk with his mother at the main house. RP 539. While he was out, a man entered the trailer and got into an argument with Pearson. RP 606, 581.

Greenfield was sitting next to Pearson when he argued with the shooter. RP 606. She was not listening to their discussion, but remembers that the man asked Pearson if he had ever been shot before. RP 609. Pearson said that he had. RP 609. The man turned and walked toward the door, then turned around with two guns. RP 609. The man said: "I'll smoke you and your bitch, too." RP 609. Pearson turned to Greenfield, said he was sorry, and pushed her away. RP 610. Pearson stood up and the man began to shoot. RP 610. More than one shot was fired. RP 612.

The man then ran from the trailer. RP 612. Greenfield felt one gun might be pointed at her, but she was not hit by any bullets in the small space. RP 620.

Kowalski was on the phone facing away from the altercation and a radio was blaring loud music. RP 582. Kowalski turned when she heard the shots. RP 582. She saw Person slumped over and Greenfield leaving. RP 582. The shooter was gone. RP 584.

Stearns was on the back porch when he heard the shots. RP 540. Immediately after hearing "popping noises," he saw a man he identified as Dustin Kelley leave the trailer, then Greenfield, then Kowalski. RP 540. He went to the trailer, looked in, saw Pearson, and called 911. RP 540. Pearson died at the scene. RP 524.

Dustin Kelley was arrested two weeks after the shooting. RP 475. He was charged with first degree murder (premeditated intent), unlawful possession of a firearm, and second degree assault (intentional assault with a deadly weapon, to wit: Handgun(s)). CP 8-9. Additionally, the State charged two firearm enhancements each to the murder charge, as well as the second degree assault charge. CP 8-10. Kelley was convicted on all three charges, and he was given a total of four firearm enhancements to his sentence. CP 83. He was given 524 months for first degree murder, with 120 months of firearm enhancements, 60 months for unlawful

possession of a firearm, and 48 months for second degree assault, with 72 months of firearm enhancements. CP 83. This appeal timely followed.

#### IV. ARGUMENT

**ISSUE 1: KELLEY WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO INTRODUCE EVIDENCE OF HIS MENTAL ILLNESS TO SUPPORT HIS DEFENSE OF FAILURE TO FORM THE REQUISITE INTENT FOR PREMEDITATED MURDER AND FAILED TO PROPOSE A DIMINISHED CAPACITY INSTRUCTION.**

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

To prevail, the defendant must show that his attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the errors were so serious as to deprive him of a fair trial. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).



The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the case would have been different. *Pirtle*, 136 Wn.2d at 487 (citing *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

The only defenses argued at trial were general denial and that Kelley lacked the requisite intent for premeditated murder. RP 849-60. The defense put on one witness who had seen Kelley intoxicated earlier on the day of the shooting and had been using methamphetamine for days on end prior to that day. RP 785, 791. The witness also testified that for Kelley to carry guns was routine, not a sign of a plan to kill someone. RP 787. No evidence of Kelley's psychological disorders was proposed by the defense. The defense proposed a voluntary intoxication instruction, but the court declined to give it because there had been no testimony that Kelley was intoxicated at the time of the shooting. RP 816-17, 819. The defense did not propose a diminished capacity instruction.

For the first time, at sentencing, the defense presented evidence that Kelley suffered from mental illness that would have been very relevant to the jury's determination of his capacity to form the requisite premeditation. In "Defendant's Memorandum Regarding Sentencing,"

defense counsel argued an exceptional sentence downward was justified because “the defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” Supp. CP, p. 2, Attachment 1 to this brief. The source of this impairment, according to the defense, as not “voluntary intoxication” (his argument at trial), but rather “his untreated mental illness.” Supp. CP, p. 2.

In support of the sentencing request, the defense provided evidence “drawn from JRA records, DOC records, and personal interviews.” Supp. CP, p. 3. According to that statement, Kelley was first diagnosed with a “mental health issue” in 2002, for which he was prescribed Zoloft. Supp. CP, p. 7. In the following years, Kelley was also diagnosed with ADHD, for which he received Ritalin and other medications. Supp. CP, p. 9. Kelley showed a pattern of having positive behavior when medicated and very negative behavior when off medications. Supp. CP pp. 6-11. He was given several other medications through DOC, including Wellbutrin and Seroquel. Supp. CP, pp. 11-12. With the vague reference that Kelley “appears to have mental health issues that need to be addressed,” there is no specific diagnosis attached to these prescriptions other than “depression” or “possible brain damage.” Supp. CP, pp. 7, 11-12. As early as 2002, corrections staff noted that Kelley “is limited on

understanding cause and effect which impacts his ability to make appropriate change.” Supp. CP, p. 7.

None of this evidence of Kelley’s psychological disorders was presented at trial in support of a diminished capacity defense,<sup>1</sup> nor was this evidence presented to show that Kelley could not form the requisite intent for first degree murder. No expert was called to testify about Kelley’s mental state.

Failing to introduce this evidence to support Kelley’s defense and the failure to propose a diminished capacity instruction fell below an objective standard of reasonableness. Kelley was prejudiced by the lack of this evidence because evidence of his impaired mental state would have had an impact on how the jury evaluated Kelley’s ability to premeditate a murder. Therefore, Kelley was deprived of effective assistance of counsel and his conviction for first degree murder should be reversed.

**ISSUE 2: THE IMPOSITION OF FIREARM ENHANCEMENTS FOR SECOND DEGREE ASSAULT WITH A HANDGUN VIOLATED THE CONSTITUTIONAL PROHIBITIONS ON DOUBLE JEOPARDY.**

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<sup>1</sup> “To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant’s ability to form the specific intent to commit the crime charged.” *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998).

The double jeopardy clause of the United States Constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense. U.S. Const. amend. 5. The Fifth Amendment’s double jeopardy protection is applicable to the States through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

Washington’s constitution provides that no individual shall “be twice put in jeopardy for the same offense.” Wash. Const. art. 1, §9. This Court gives Article 1, Section 9 the same interpretation as the United States Supreme Court gives to the Fifth Amendment. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

The double jeopardy clause protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

To determine if separate prosecutions violate double jeopardy prohibitions, the courts utilize the *Blockburger*, or “same elements” test.

*United States v. Dixon*, 509 U.S. 688, 697, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

*Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Two offenses are the same offense for purposes of double jeopardy analysis when one offense is necessarily included within the other and, in the prosecution for the greater offense, the defendant could have been convicted of the lesser. *State v. Roybal*, 82 Wn.2d 577, 582, 512 P.2d 718 (1973). Thus, conviction or acquittal on a lesser included offense bars the government from prosecuting the defendant for the greater offense. *Green v. U.S.*, 355 U.S. 184, 190-91, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Likewise, while the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. *State v. Freeman*, 153 Wn.2d 735, 770-71, 108 P.3d 753 (2005).

In *Apprendi* and *Blakely*, the Court clarified the long-standing requirement that any fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a

reasonable doubt, even if the fact is labeled a “sentencing enhancement” by the legislature. *Blakely v. Washington*, 542 U.S. 296, 306-7, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). “Our decision in *Apprendi* makes clear that “[a]ny possible distinction” between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding.” *Blakely*, 542 U.S. at 306-7. Accordingly, the Supreme Court treats sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. *Blakely*, at 306-7.

The Supreme Court has also held that “aggravating factors” that may make a defendant eligible for an exceptional sentence or the death penalty “operate as the functional equivalent of an element of a greater offense.” *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), quoting *Apprendi*, 530 U.S. at 494 n. 19.

The aggravating factors that make a defendant eligible for the death penalty also operate as elements of a greater offense for purposes of double jeopardy. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). In fact, in *Sattazahn*, Justice Scalia, writing for a plurality of the Court, found “no principled reason to

distinguish” between what constitutes an offense for purposes of the Sixth Amendment right to a jury trial and what constitutes an offense for purposes of the Fifth Amendment’s Double Jeopardy Clause. 537 U.S. at 111. (“If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s).”)

In *State v. Recuenco*, 154 Wn.2d 156, 162-3, 110 P.3d 188 (2005), the Washington Supreme Court held that facts to support a firearm enhancement must be proved to the jury.<sup>2</sup> Like the aggravating factors in *Ring*, the additional finding increases the punishment faced by the defendant and so operates as the functional equivalent of an element of a greater offense.

Here, in count three, Kelley was convicted of second degree assault while armed with a deadly weapon, namely a handgun. CP 9-10, 79. By special verdict, the jury again found Kelley was “armed with a firearm” when he committed the assault. RP 894.

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<sup>2</sup> The Supreme Court overruled *Recuenco*’s holding that *Blakely* errors cannot be harmless error, but not the application of *Apprendi* and *Blakely* to firearm enhancements. *Washington v. Recuenco*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2546, 165 L. Ed. 2d 466 (2006).

RCW 9.94A.533, the “Hard Time for Armed Crime” initiative, shows the voters’ intent to create exemptions for crimes where possessing or using a firearm is a necessary element of the crime, such as drive-by shooting or unlawful possession of a firearm. RCW 9.94A.510(3)(f). However, it appears that the voters were unaware of the similar problem of redundant punishment created when a firearm enhancement is added to a crime where the punishment has already been increased due to the necessary element of involvement of a firearm. There is no language showing the intent to punish crimes committed with a firearm again with a firearm enhancement. This is a change from prior law, where the legislative intent to attach two punishments was clear in the language itself. *See Adlington-Kelly*, 95 Wn.2d at 924.

The “Hard Time for Armed Crime” initiative was passed long before *Apprendi* and *Blakely* reshaped the sentencing landscape. Thus, state law did not view additional findings triggering an increased sentence as implicating the rights to a jury trial, due process of law, or double jeopardy. *Cf., former* RCW 9.94A.535.

Because under *Blakely* and *Apprendi* factual findings that support sentencing enhancements constitute elements of a crime, they also constitute a new, greater offense for purposes of double jeopardy. There is “no principled reason to distinguish” between the statutory elements of the



crime—which in this case included possession of a “deadly weapon”—and the statutory firearm enhancement—which again punishes for the same finding. *See Sattazahn*, 537 U.S. at 111-12 (“The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence not only delimits the boundaries of . . . important constitutional rights, like the Sixth Amendment right to trial by jury, but also provides the foundation for our entire double jeopardy jurisprudence.”)

Division I of this court has previously rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon is an element of the underlying offense. *See e.g. State v. Nguyen*, 134 Wn. App. 863, 142 P.3d 1117 (2006), 137 Wn. App. 1, 150 P.3d 643, 2007 Wn. App. LEXIS 102 (2006); *State v. Huested*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003). The state Supreme Court addressed this issue under the old firearm enhancement statute, which contained different language, and held there was no double jeopardy violation. *State v. Adlington-Kelly*, 95 Wn.2d 917, 631 P.2d 954 (1981). Neither the state supreme court, nor this division, has addressed the effect of *Blakely* and *Apprendi* on this question. Appellant respectfully submits that Division I has not correctly applied the law and therefore this court should not follow those opinions. The Supreme Court opinion is no longer persuasive in

view of the changes to the firearm enhancement statute, as well as *Blakely* and *Apprendi*.

Kelley's assault charge was elevated to a higher degree by the element of being armed in committing the crime. RCW 9A.36.021(1)(c). Therefore, again elevating the crime for the same underlying act—use of a firearm—violates double jeopardy. This court should reverse and remand with the direction that the firearm enhancements be vacated. *See State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007).

## V. CONCLUSION

Kelley was deprived of effective assistance of counsel because his counsel failed to introduce evidence of his mental illness to show his inability to form the requisite intent for premeditated murder. Further, counsel's failure to propose a diminished capacity instruction based on this evidence was also ineffective. These mistakes prejudiced Kelley's ability to present a defense to the first degree murder charge and the introduction of that evidence, combined with the diminished capacity instruction would have impacted the jury's deliberation. Therefore, Kelley's conviction of first degree murder should be reversed.

Further, the imposition of firearm enhancements on the second-degree assault conviction violated double jeopardy because both the underlying conviction and the enhancement punished the same act—use of

a firearm. Therefore, the enhancements attached to count III should be vacated.

DATED: September 21, 2007

By: Rebecca W. Bouchey  
Rebecca Wold Bouchey #26081  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on September 21, 2007, I caused a true and correct copy of this Appellant's

Brief to be served on the following via prepaid first class mail:

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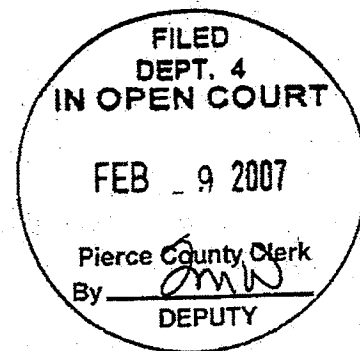
Rebecca W. Bouchey  
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**ATTACHMENT 1:**  
**Defendant's Memorandum Regarding Sentencing (2/9/07)**  
**Supplemental Clerk's Papers**

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7 **SUPERIOR COURT OF PIERCE COUNTY WASHINGTON**

8 **STATE OF WASHINGTON,**

9 **Plaintiff,**

**NO. 06 1 00938 1**

10 **vs**

11 **DUSTIN ROSS KELLEY,**

**DEFENDANT'S MEMORANDUM  
REGARDING SENTENCING**

12 **Defendant.**

13 Defendant DUSTIN ROSS KELLEY, by his attorney James A. Schoenberger,  
14 submits this memorandum to the Court in relation to his sentencing.

15 **I. FACTS**

16 The facts underlying this matter are accurately set forth in the State's Sentencing  
17 Memorandum, previously filed with the Court.

18 **II. AN EXCEPTIONAL SENTENCE DOWNWARD IS REQUESTED**

19 In it's sentencing memorandum, the State seeks a sentence totaling 740 months.  
20 Allowing for a 10% Earned Release Time credit on the proposed 548 month base  
21 sentence recommendation, exclusive of the enhancements, this nets to more than 57  
22 years. For a 22-year-old man, this is a life sentence.

23 RCW 9.94A.535 provides that the court may impose a sentence outside the  
24 standard range if it finds substantial and compelling reasons justifying such an  
25 exception. The Defendant relies on Section (1) (e) of this RCW whereby the court may

DEFENDANT'S MEMORANDUM  
REGARDING SENTENCING

**ORIGINAL**

1 consider as a mitigating circumstance the fact that the defendant's capacity to appreciate  
2 the wrongfulness of his or her conduct, or to conform his or her conduct to the  
3 requirements of the law, was significantly impaired.

4 Defendant suggests that his untreated mental illnesses did significantly impair  
5 his capacity to appreciate the wrongfulness of his conduct, or to conform his conduct  
6 to the requirements of the law. Evidence to support this assertion is detailed in the  
7 attached letter, incorporated herein, *in haec verba*.

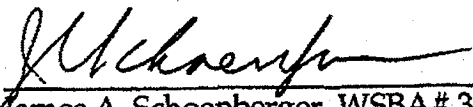
8 It is not suggested that Defendant's voluntary intoxication is the basis for this  
9 impairment. The drug useage was his attempt to self medicate his untreated and un-  
10 medicated mental illnesses.

11 The defense suggests, based on the mitigating factors outlined in its attached  
12 letter, that guidance for an exceptional downward sentence may be found in the  
13 sentencing guideline ranges for Manslaughter in the First Degree. At 9 or more points,  
14 that range is 210 to 280 months.

15 Using the low end of 210 months, for the sake of argument, with 192 months for  
16 enhancements and 21 months assumed Earned Release Time credit, that net sentence  
17 is nearly 32 years. This amount of incarceration is more than adequate to accomplish  
18 the sentencing goals of protecting society, preventing recidivism, and punishing the  
19 defendant for his crimes.

20 We respectfully ask this Court to sentence Dustin to 210 months plus 192  
21 months in enhancements for a total of 402 months.

22 Respectfully submitted this 6<sup>th</sup> day of February 2007.

23   
24 James A. Schoenberger, WSBA # 33603  
25 Attorney for Defendant

Law Office of

**JAMES A. SCHOENBERGER**

February 6, 2007

The Honorable Bryan Chushcoff  
Pierce County Superior Court  
930 Tacoma Ave. South  
Tacoma, WA 98402

**RE: State vs. Dustin Ross Kelley; Pierce County No. 06 1 00938 1  
Mitigating Circumstances Meriting Leniency**

Your Honor:

In the instant matter, Mr. Kelley was found guilty of Murder 1, Assault 2 and Unlawful Possession of a Firearm in the Second Degree on November 21, 2006. The purpose of this letter is to outline the substantial, significant and compelling circumstances, which mitigate against imposing a standard range sentence on Mr. Kelley. Based on your review of this letter and the enclosed material, we are hopeful that you will agree with our position that Mr. Kelley should be afforded leniency.

The following materials have been drawn from JRA records, DOC records, and personal interviews.

### **I. Biographical Outline**

Dustin Ross Kelley was born August 6, 1984, in Tacoma, Washington to Victor Kelley and Lisa Rogers Kelley. When Dustin was born, the Kelley's already had a two year old daughter, Kristi. During the marriage, Victor and Lisa abused drugs and alcohol. Lisa readily admits she abused alcohol and used marijuana during her pregnancy with Dustin.

Dustin's mother, by her own admission, never spent much time with Dustin when he was a toddler. In fact, she has stated that she regrets that she left him to feed himself in his high chair. Lisa stated she placed food on his tray rather than taking the time to spoon feed him. She reported there was more food all over him than in him and he was always very skinny.

Dustin and Kristi spent time with Lisa's parents, Grandma (Darlene) and Grandpa (Budd) Rogers's house in the South Tacoma area. Lisa reports that Grandma took Dustin with her sometimes because of the way she was treating him. At Grandma's, Dustin loved his Grandpa Budd. He would follow him everywhere and copy what he did.

In 1987, due to her drug and alcohol addiction, Lisa left three year old Dustin, and five year old Kristi, with their father and moved out. Within a few months of Lisa's departure from her family, Victor moved the children to Fresno, California to be near his mother, sister and brother.



Honorable Bryan Chushcoff  
February 6, 2007  
Page 3 of 13

In 1995, when Dustin was 10, Lisa went into rehabilitation. While in rehab, it was discovered that Lisa was bi-polar and schizophrenic. Lisa reports her mother is a bi-polar alcoholic, as is her brother. Dustin, Victor stated, was born into a four generation alcoholic family.

#### The Kelley's move back to Washington State

After completing rehab (late 1995) and feeling like she could handle the responsibility, Kristi who was now in the 9<sup>th</sup> grade, come live with Lisa in Tacoma. Sometime later Dustin also joined his mother. Soon afterwards Dustin and Lisa began clashing and Lisa found she couldn't control her son. Lisa told Victor she had to lock Dustin out of the house because of his behavior. Another time Dustin was on the roof of the house and was out of control.

Victor moved into the Spanaway area with a friend and Dustin moved in with him there. Lisa and Victor began spending a lot of time together and eventually moved back in together in South Tacoma as a family. Ultimately the reunion produced a third child, Dylan who is now seven.

Dustin and his mother continued struggling to get along. Victor has actually seen the two attack each other in anger and frustration. Once, Dustin broke the back door window by banging it open and shut repeatedly and then took off rather than to take responsibility and wait for the police. After another incident, when Dustin called his dad to ask for money, Victor invited him over and then Victor and a couple of friends zip-tied his hands and called the police. Victor reported it was one of the hardest things he ever did but he wanted Dustin to learn from his mistakes.

Because Dustin was not going to school each day, Victor hired a man named Mike to transport Dustin back and forth to school. When Victor learned his son was slipping out and taking off after Mike would drop him off, Victor paid Mike to sit there and make sure Dustin didn't leave school. But school bored Dustin and he continued skipping whenever he could. He attended Edison Elementary School until the third grade when he was kicked out for behavior problems. After this point, Dustin never really got back into school on a full time basis and his hatred for women teachers or women in authority began.

The last full year of school Dustin completed was the eighth grade. His high school records indicate he was suspended from classes many times for disrespectful behavior, truancy, class cuts and leaving campus without permission. Dustin's records also indicate his thinking skills were low as well as his math and spelling skills. In most classes he simply passed. Dustin reported he failed in school because he was cutting classes, he was bored, he wasn't motivated and school was not enjoyable to him.

Dustin began to use drugs and alcohol. As this abuse accelerated, so did his illicit behaviors. He first got into problems with the police at age 13 and has been in trouble ever since, living on the streets, and in juvenile hall. He began using all different types of drugs including alcohol, THC, marijuana and, ultimately, his drug of choice, methamphetamine.

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By 1999, Dustin was placed into Oakland Alternative high school for non-attendance. In a letter dated May 21, 1999 to Doris Roundtree, Dustin's Pierce County Juvenile Court Probation Officer, Dustin's teacher, Robert Matzdorff, reviewed Dustin's behavior since enrolling in his class on March 16, 1999. The letter stated, "He has accomplished very little. He has missed 22 days during that time; most of those absences were unexcused. When he is in class he is very disruptive. He usually refuses to work. He bothers other students and interrupts their learning and work. I constantly remind him that his behavior is inappropriate but that rarely fails to halt his actions. He seems neither interested nor to care about the consequences of his actions."

In July 2001, however, Dustin was awarded a GED Certificate for successful completion of the required testing program.

#### Community Services and Intervention

On May 12, 2000, Dr. Robert Womack, BA, CDC (Chemical Dependency Counselor) III, did an extensive interview of Dustin. Dustin told Dr. Womack his low weight was due to his constant use of crank for over a four month period of time. Dustin's testing indicated a red flag for alcohol and substance abuse as well as the severity and he was referred to for an evaluation of his drug and alcohol use.

In the Psychological Screening Inventory Dustin scored in the "norm in alienation." According to Dr. Womack, the Social Non-Conformity score was also in the norm. However, Dustin scored low in the discomfort. "This usually means the person perceives themselves as satisfied and subjectively comfortable, adaptable, resourceful and able to meet a new situations with flexibility. In a dysfunctional client, this indicates a poor prognosis for change at the current time. Dustin's Expression scale score was 51, in the normal range. The defensive scale was 10, indicating he was being open and honest."

#### Dr. Womack's diagnostic report on Dustin:

DSM-IV Substance dependence based on: Tolerance, poly drug use, binge use, prior treatment has failed, loss of control over behavior, loss of control over intoxication, anxiety to begin consumption and rapid ingestion rate, family history of chemical dependency, frequent intoxication, psychological disruption.

#### Dustin's Placement Dimension:

Dimension I: Acute Intoxication and or withdrawal.

Dimension II: Biomedical conditions and complications.

Dimension III: Emotional and Behavioral Conditions and Complications.

Dimension IV: Treatment Acceptance and Resistance.

Dimension V: Relapse and Continued Use Potential.

Dimension VI: Recovery Environment.

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It was recommended by Dr. Womack that Dustin have intensive outpatient treatment and that if he failed at outpatient treatment that he was to be placed into inpatient treatment. He classified Dustin as "Early Stage Dependent" and it was recommended he should be in a DASA approved agency and he was eligible for the CDDA (Chemical Dependency Disposition Alternative) Program.

He was in the RHADD Program from 10/2/2000 to 10/29/2000. He successfully completed that program. At that time he was diagnosed with amphetamine dependence, marijuana dependence and hallucinogen dependence.

Dustin entered CDDA with on 2/7/2001 and ended it 2/6/2002. He attended outpatient treatment at Pierce County Alliance until December 2001.

He had individual counseling with Bill Melanie who saw Dustin's primary issue as Conduct Disorder. He also had counseling with Catholic Community Services between 1996 and 1998.

Dustin was then placed at the Ryther Treatment Center and completed the program between May 26, 2001 and June 13, 2001. He was then placed at the Safeco Recovery House but timed out on June 13, 2001. He was timed out to Remann Hall June 15 - 18 and then discharged from the recovery house due to lack of cooperation.

#### Juvenile Incarcerations

His first incarceration as a juvenile was at Mission Creek Youth Camp on 4/1/02 for first degree theft, third degree assault and eluding police.

During his stay there his behavior was challenging. Dustin was in and out of room confinement for his behavior, he had poor responses to staff directives and corrective action. Staff found him hard to talk to about his behavior since he had a hard time controlling his anger and he automatically became defensive. It is specifically noted in his records that "he is a special education resident who struggles meeting basic program expectations. He is limited on understanding cause and effect which impacts his ability to make appropriate change."

Dustin was placed on 100 mg of Zoloft by Dr. Womack because he "appears to have mental health issues that need to be addressed." It was also noted he had impulsive behavior problems.

While incarcerated there, he met a teacher, Rose McKeown, from North Mason School District. Rose reported that Dustin always faithfully attended her classes. One day, however, he didn't show up and Rose couldn't find him. She went to one of the Corrections staff who told her where he was.

The guard popped opened the door, and Rose found a distraught Dustin in isolation with his head in his hands. The first thing he said to her was, 'How can I find God?' After talking for a short time Rose recited Jeremiah 29 11-13 and began to leave. Dustin looked up at her startled and

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asked, 'How did you know my mom dedicated those scriptures to me?' Rose stated, "I didn't. God did."

Rose saw what she thought was positive qualities in Dustin and she became his Christian mentor. Rose noted Dustin can be a fast reader and well read; but his vocabulary is very limited due to lack of education.

One day Rose received a call that Dustin wanted to see her. Rose went to see him, and together they prayed for two hours on bended knees. On April 25, 2002 he was transferred to Maple Lane for further mental health treatment and counseling. To continue her work with Dustin, Rose began a regular 140 mile round trip to Maple Lane. She did that every other week for approximately 9-10 months.

After Dustin's initial placement at Maple Lane School, he was found to be very uncooperative with staff. While at Maple Lane, Dr. Tore K. Nielsen evaluated Dustin and wrote a Psychiatric report. Dated May 14, 2002 Nielsen reported that "He has big problems with drugs and alcohol and presently his main problem is that he cannot calm down when he gets angry.

## **II. MITIGATING FACTORS OF CRIMINAL HISTORY**

Dr. Tore K. Nielsen from Maple Lane School listed the following diagnosis.

- Axis I: Conduct Disorder, medium onset, moderate to severe.
- Axis II: No diagnosis.
- Axis III: No diagnosis.
- Axis IV: Moderate
- Axis V: GAF: 68

The doctor put Dustin on many different medications in an attempt to calm him down and help him with his concentration.

In a May 29, 2002 Maple Lane Intake and Assessment report written by Patricia A. Graham, JRRC, the Mental Health Target Population score indicated possible brain damage for Dustin.

By October of 2002 his medications were beginning to work and he was showing improvement in many areas. In December 2002, Dustin successfully completed Intensive Inpatient Treatment. He earned Phase 2 status, which is the third highest in-house level. He completed all of the written assignments and appeared to have a good understanding of how his addiction has affected his life. "When expectations and consequences are known to Dustin, he can meet the expectations without much of a problem" one staff reported.

January 21, 2003 Dr. Nielsen reported that Dustin was doing very well and would reach Level 4. "He is working two jobs and obviously in a good space." Dustin told the doctor he wished the Ritalin would last a little longer.

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In February 2003, Dustin was eligible to go home but his family was too unstable so he was transferred to the Naselle Youth Camp from the Maple Lane School. Dr. Neilsen established in his memos that Dustin functions much better on Ritalin than without. "Dustin has tried to be without it and his behavior deteriorates fairly rapidly and then when he gets put back on the Ritalin he calms down and becomes manageable. In fact, he has reached Level 4 which is an indication of how well he is doing."

After successfully completing his inpatient treatment, he was moved to the Aftercare program at Maple Lane. "Since the day he moved to Aftercare, Dustin appeared to be positive towards his treatment issues" and only received minor sanctions which he worked hard to comply with his Aftercare contract. "Dustin always had a positive attitude and continued to hold himself accountable for his actions. Dustin appears to need some attention and reminding about his goals. Dustin appears to be vulnerable to his peers in trying to please them and fit with the circle of friends" another staff reported.

On 2/18/2003, Dustin's counselor John M. Scott reported "Dustin has not been a behavioral problem since entering the Rainier Living Unit in January. He has been able to stay out of trouble and gain his level 4 status. Dustin appears to be a good worker and has been able to work 2 full time jobs. He works both on crew and at the central kitchen. Dustin usually has a positive attitude and has been able to accept his consequences when he has broken the rules. Dustin appears to be focused on his goal of going to school and getting a degree in Culinary Arts. Dustin is a high energy young man who needs to be involved in some kind of activity at all times."

Kathy Kroening, PhD. A.R.N.P. did a Psychiatric Assessment Intake Summary on Dustin. She reported that over the next several months since entering Naselle Youth Camp, Dustin's symptoms of depression seemed to dissipate but he began having more difficulty with concentration and attention. She then added Remeron to his Zoloft to help him sleep. Dustin continued on various doses of Ritalin in an effort to manage his symptoms.

Kroening listed the following diagnosis:

- Axis I: Conduct Disorder  
 Attention Deficit Hyperactivity Disorder – inattentive type
- Axis II: No diagnosis.
- Axis III: No diagnosis.
- Axis IV: Incarceration  
 Strained relationship with parents
- Axis V: GAF: 50

To continue her mentoring with Dustin, Rose drove monthly to the Naselle Youth Camp. Dustin worked days for the Department of Natural Resources crew where they reported he displayed a

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consistently good work ethic. There were some problems with staff and peer interactions so Dustin entered the Sunrise Community Facility on 5/30/2003.

In a 12/10/2003 report by Bruce Reim, Dustin enrolled in the Columbia Basin Job Corps program in Moses Lake, WA. "He quickly cemented himself into the cement trade. He had a positive relationship with the instructor and became crew chief. He was involved with several projects located around the Basin receiving positive strokes for his workmanship and dedication to each project." Due to weather conditions he was transferred to the plastering trade. It was planned that he was going to stay in that trade until work opened up in the early spring of 2004. "Dustin's issues centered around facility behavior and attitude. Dustin is an intelligent young man that has not learned to use his abilities for good. He was the house lawyer on several occasions that resulted in Dustin becoming part of the problem rather than the solution. However, he did process the situations well and near the end of his stay at Sunrise, he became a positive resident with good input."

Dustin was involved in many different projects while in Eastern Washington. His crew built the Wilson Creek Skate Park, a Moses Lake Elementary School playground and sidewalks, the humane society in Quincy and many foundations at other job sites. Dustin is very proud of his hard work at these sites.

Dustin was transferred from Sunrise Community Facility to Touchstone CCF because of some problem staff and peer interactions. At Rainier he worked very hard and participated on the crew. In a report dated 2/13/2004 by Trisha Labarge, she stated, "Although it is apparent through his current behavior and past reports from several placements that Dustin has some social interactions problems, it is also consistent that Dustin is a consistent and valued worker."

According to Rose, Dustin also worked in the kitchen and went to school nights despite already having his GED, and volunteered all his other time to Habitat for Humanity. Dustin helped build a home with the Habitat where he flourished with his work and his abilities. He built a bathroom all on his own there.

When Dustin was transferred to Touchstone, a half way house in Olympia, Rose reported they reduced his medications and he began to slip backwards. Rose continued to try and get him back on his medications but, despite her efforts, this didn't happen.

On 3/26/2004, Danita O'Connell, a diagnostic counselor at Touchstone CCF in Olympia, reported that Dustin had a great work ethic and distinguished himself as an "intelligent, dedicated employee who was invested in quality workmanship. He had a good relationship with his instructor and was able to work himself up to the position of crew chief as a cement worker. Since entering the Touchstone program, Dustin was committed to work on his community transition plan and was motivated to do well. Dustin's treatment plan included: Life Skills, Sexuality group, Relapse Prevention group, weekly AA/NA, DUI Victim Impact Panel Presentation, Employment Skills group, Peer Culture group and DBT. Dustin met all program expectations with little or no infractions."

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On April 10, 2004 Dustin was released from JRA supervision to parole supervision with his father. He was hoping to develop a relationship with his mom, but things began to get worse for Dustin. Rose questioned him staying there at the time because she knew the family was so unstable. Dustin reported on 12/16/2004 that 111 days is the longest he had ever been out of custody.

Without proper medication, and perhaps in an attempt to self-medicate, Dustin got involved again with illegal drugs and his life began spiraling downwards rapidly. He began hanging around a guy named Jimmy Wamsley with whom he did odd jobs.

Dustin was arrested and booked into the Pierce County Jail for UPCS on May 4, 2004.

Dustin was placed on warrant status on 6/17/2004 by his parole officer for whereabouts unknown.

He pleaded guilty as charged on 7/26/2004 for the UPCS.

On August 17, 2004 he was arrested and booked into the Pierce County Jail for Unlawful Possession of a Firearm 2.

On September 14, 2004 Dustin pleaded guilty to the Unlawful Possession of a Firearm 2 and Escape 2 and was sentenced 17-22 months.

Dustin was first sent to Shelton and then on to Walla Walla State Prison for his crimes. When he arrived on the chain 10/28/2004, he was again without medications, despite DOC records which clearly indicated he was ADHD with an impulse disorder. It wasn't until November 18, 2004 that Dr. Grubb finally started Dustin on Wellbutrin and Seroquel. In a psychological report dated February 28, 2005, Dr. Richard Jacks ordered Dustin's medication for his ADHD. Jacks stated, "I would expect that if Mr. Kelley is able to obtain medication for his ADHD, his odds of successfully completing his prison stay will go up significantly." However, after reviewing Dustin's DOC records, there is no indication that Dustin was ever given the prescribed medication.

Dustin was then transferred to Washington Corrections Center and then to McNeil Island Corrections Center on June 22, 2005. In his interview with B. Reed, ARNP, Dustin reported he "hears noise, background and indistinct all the time."

On August 6, 2005, Dustin was 21 and was discharged from the JRA.

Dustin was released from McNeil Island Corrections Center, 8/28/2005 without any medication for his ADHD, impulse control or his depression and without any kind of rehabilitation for his substance abuse problem, as had been ordered by the Court.

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### AFTER PRISON

Upon Dustin's release from McNeil Island in late August, he stayed for a short time with Rose McKeown in Mason County. While he stayed with Rose, Dustin helped her move into a house and together they built a fence on the property. After working with Dustin for so many years, Rose has found that when is straight and clean he is a "really a nice kid." He thoroughly enjoys cooking and is very good at it. Rose also encouraged him to get a new evaluation from Choice Medical, but he never did. One of Rose's favorite achievements with Dustin is watching him teach other kids to use cereal names instead of swearing. Rose always told him "everything matters" and he needed to remember that.

After helping Rose in Mason County, Dustin got a job on a construction crew. Many problems began for Dustin when he swallowed diesel fuel in an accident while at work. It was getting late, and the pipe being laid needed to be completed before they left the job site. The crew ran out of fuel and Dustin tried to siphon some fuel from another rig. When someone let go of the other end they were holding, Dustin accidentally swallowed the fuel. He was admitted into Good Samaritan Hospital.

According to Dustin's family, he continued his relationship with Jimmy Wamsley after prison. Some people have suggested Jimmy is part of the bloods gang. Dustin was so mesmerized by Jimmy that he once told his father he'd take a bullet for him.

Dustin would disappear whenever he used drugs. He knew Rose could tell when he was using drugs just by looking at him. And Rose would go looking for him in Tacoma, only finding him a few times. Rose knew things didn't sound good when he started talking about staying in motels. When using drugs Dustin is surly with Rose. When he's clean, he's very respectful towards her.

One time Dustin disappeared he ended up at the Snohomish County jail. The jail was only holding him for speeding and it was New Years Eve. They told him they were going to release him but Dustin told them "No, you want me for parole violation." Rose went to the effort to go and see him in the Snohomish County jail. She encouraged the jail to hold him for as long as they could but it wasn't long before he was out.

Rose has contacted Dustin's probation officer in the past and told them he needed to be "reigned in." It didn't happen. Rose feels that drugs have caused all of these problems for Dustin and it was his own parents which exposed him to that environment. Dustin once told Rose that his life became much worse and he started spinning out of control because of not being on his prescribed medication, swallowing the diesel and inhaling fumes from cooking meth. There is documentation in his DOC records where staff wondered if he had brain damage from all the substance abuse.

Dustin took up with Molly Matlock a year ago last Fall. He mentioned to Rose that he'd noticed that she resembled a younger version of his mother. Rose noticed this as well



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### **III. MITIGATING FACTORS OF CURRENT CHARGE**

Dustin has very little memory of the shooting. In fact, he has no memory whatsoever of shooting the victim or much of the time in question. He only recalls leaving the house, Beau being very angry and asking his name, and then Beau making some unfounded accusations. Dustin stated he also recalls Beau having a [propane] torch and a piece of glass. Dustin stated he then recalls going outside, getting high, using his cell phone and leaving.

Dustin is very frustrated about the time frame because a witness told him Beau challenged him. Dustin reported he had been up 14 days with only two days worth of sleep. He reported at the time, he had been inhaling nitrous oxide, using ecstasy, weed and meth. Obviously, Dustin was strung out and not in his right mind at the time of the shooting. He doesn't know if he reacted to the challenge or if what happened even registered in his mind. All Dustin knows is he has been told he killed Beau and that due to the high dose of drugs he had been ingesting, he must have automatically reacted – "fight or flight." He admits he carried a gun, but is adamant it was only for self protection since he carried large amounts of cash and drugs.

After the shooting, Dustin stated he fled to California because he had warrants out on him, not because of the shooting. Molly went with him. After a while, Dustin offered her bus money to go home. He told Molly this was his to deal with and she should go, but she didn't take him up on it. Dustin and Molly were apprehended in Bakersfield, CA.

Molly has a son about the same age as Dustin's 7 year old brother Dylan. Dustin has encouraged Molly to get into treatment. He begged Rose and his father to help get Molly into treatment for her son's sake. Molly's parents offered Dustin \$20,000 for an attorney to help him with his Murder charge, but Dustin told them, "No, use it for her."

Dustin's mother, Lisa, knew the victim, Beau, and works with some of his friends. She has not visited Dustin while in the Pierce County Jail nor did any of his family attend the trial. His mother has in fact pulled all of Dustin's pictures down and cannot forgive him for what has happened. She also has unresolved conflicts because she had fought with Dustin and Molly just prior to the murder. Lisa was upset at her son for not calling often enough and for the Mohawk he was then sporting. Lisa stated that when he came over, it was like identity theft had happened with her son. "The person who came over didn't look like my son and he didn't sound like my son. I tried to talk to him about getting back on his medication and off the drugs". Dustin told his mother that day that he wanted out of the life he was in.

#### **Summary**

Dustin's life has been one overwhelmed by a troubled childhood, unstable mental health, violence, drugs and alcohol.

He was born to a drug and alcohol addicted mother who never bonded with him and then abandoned him at three years of age to pursue her heroin addiction. His father also admits to

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using drugs and alcohol. It was his parent's duty to protect Dustin from all these forces which they obviously failed to do. The deprivation alone of his parent's protection severely limited positive and available options to Dustin as he grew into adulthood. He never had a positive example to follow, thus impairing his ability to choose responsibly.

The maternal side of his family has four generations of alcoholism, brutal violence, mental health issues and substance abuse. Dustin's maternal grandfather was violent with his family and ended up dead after attacking his ex-wife. As Dustin's life spun out of control his abuse of alcohol and drugs increased – just like his mother. He was damaged at an early age by his mother and father's choices and by forces out of his control. Dustin has not produced any children because he doesn't want to put his children through what he's been through.

A significant change in Dustin's behavior occurred when he was kept on his medication while at Maple Lane. Consistently, every time Dustin was taken off his medication while in JRA he became difficult to manage. On the streets, when he didn't have medication to take, he self medicated with illegal drugs and alcohol. While the doctor at DOC ordered Ritalin for Dustin, he never received it. When he was released from McNeil Island he was not given any medication like JRA had always provided.

All through JRA Dustin wanted to be stable enough on his medication so he could continue his education and become a drug and alcohol counselor. It didn't happen because he was never stabilized long enough anywhere to complete his dream. He turned to cement finishing and plastering to keep his hands and mind busy. When he was released from JRA, and then later prison, labor jobs didn't keep him going. Again, he returned to the streets to self medicate and survive.

His mother's isolation didn't help Dustin either. Whenever he felt he was building a relationship with her they would butt heads and that would send him spiraling downward. Without ever learning how to make good choices, Dustin headed back to the streets to friends and drugs; again self medicating to help turn the music off he heard inside his head.

Beau Pearson's death has increased the considerable rift between Dustin and his mother because his mother knew Beau. Neither of his parents attended the trial. Rose did what she could to support Dustin, but didn't have the leave time from her job to attend the entire trial.

Despite his own problems, Dustin has shown great compassion for Molly Matlock and her young son. He has begged Rose and his father to help her get into drug rehab. Molly's parents offered him money for private counsel to help him with his murder charges, yet he insisted they use the money to help Molly. Dustin has stated to many people that he wants Molly's young son to have a mother to be there for him.

Dustin has proven through his work as a cement finisher at the Columbia Basin Job Corp, and Habitant for Humanity, that he has quite an aptitude for doing fine work of which he is proud of.

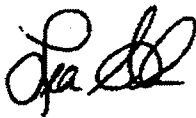
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Dustin is also quite an artist and enjoys drawing anything and everything. He especially enjoys sending Molly and her son the various pictures he has been creating.

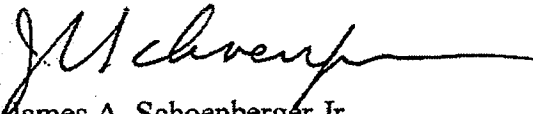
On the day of Beau's murder, Dustin was in possession of a large sum of money and drugs and he was carrying a gun for protection. Lisa Kelley is witness to Dustin being in constant fear of being robbed and or shot by the gang. Dustin's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, was significantly impaired by his untreated mental illnesses, which he attempted to treat himself through the use of illegal drugs when he was unable to obtain the prescribed medications that had helped him in the past.

Thank you for your consideration in reviewing this letter.

Sincerely,



Lea Sanders  
Chief Investigator, Hawkeye Investigation Services



James A. Schoenberger Jr.  
Attorney